



## Appendix C - History of the legislation

The ASIO Legislation Amendment (Terrorism) Bill 2002 was part of a suite of anti-terrorism legislation introduced into the Parliament in March 2002.

The following summarises the purpose of the legislation, its passage through both Houses of the Parliament with a particular focus on the reviews carried out by Parliamentary Committees, and some of the more contentious aspects of the proposed legislation.

### **Purpose of the legislation**

The purpose of the ASIO Legislation Amendment (Terrorism) Bill 2002 was to amend the ASIO Act by expanding the special powers available to ASIO to collect intelligence relating to the threat of terrorism. The Attorney-General, in his second reading speech, stated:

Importantly, we have introduced a range of new terrorism offences. In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.<sup>1</sup>

Specifically, the Bill proposed:

- including the definition of a terrorism offence in the ASIO Act;

<sup>1</sup> The Hon Daryl Williams MP, Second Reading Speech, *ASIO Legislation Amendment (Terrorism) Bill 2002*, House of Representatives *Hansard*, 21 March 2002, p. 1930.

- providing a power to detain, search and question person before a prescribed authority; and
- permit personal searches to be authorised in conjunction with detention warrants.

The Bill was referred to the PJCAAD for review and an advisory report. In conjunction with a suite of other counter-terrorism legislation, the Bill was also referred to the Senate Legal and Constitutional Legislation Committee. Both Committees were given until 3 May 2002 to report.

The proposed legislation, in its original form, provided for the questioning of persons without legal representation and with the right to silence removed. It provided for the incommunicado detention of persons without charge for up to 48 hours, and, by allowing for warrants to be repeatedly sought and issued, provided for the possibility of indefinite detention.

## **Passage of the legislation through both Houses of Parliament**

### **PJCAAD Review June 2002**

The ASIO Legislation Amendment (Terrorism) Bill 2002 was the most contentious review undertaken by the PJCAAD with over 150 submissions being received from ASIO, other government departments and agencies, non-government organisations and interested individuals. The Committee had a private briefing from ASIO and conducted public hearings in Sydney and Melbourne. Most of the non-government witnesses were opposed to the introduction of the legislation or critical of various aspects of it.

On 14 May 2002, the House of Representatives and Senate resolved that the time for the PJCAAD to present its report on Bill be extended to 11 June 2002. The Committee reported to the Parliament on 5 June 2002.

The PJCAAD report entitled *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002*, made recommendations in relation to three main areas:

- the issue of warrants;
- the detention regime, including legal representation and protection against self-incrimination; and,
- accountability measures.

In summary, the Committee's proposals were:

### Issue of warrants,

- all warrants should be issued by a Federal Magistrate and, in those cases where detention would exceed 96 hours Federal Judges to issue all warrants;
- members of the AAT undertake all duties of the prescribed authority excluding the power to issue warrants;
- the Bill be amended so as to make the maximum period of detention of a person no more than 7 days (168 hours);

### The detention regime

- provision be made for legal representation for persons subject to a warrant, such as the creation of a panel of security cleared lawyers;
- the prescribed authority be required to advise the person subject to a warrant that they have the right to seek judicial review after 24 hours of detention;
- a protocol be developed governing custody, detention and the interview process;
- the Bill be amended to provide protection against self-incrimination for the provision of information relating to a terrorism offence and to include a penalty clauses for officials who do not comply with the provisions of the Bill;
- no person under the age of eighteen years be questioned or detained.

### Accountability measures

- publication of the information relating to the issuing of warrants in ASIO's Annual Report to Parliament.
- information relating to the issuing of warrants be provided to the Inspector General of Intelligence and Security (IGIS)
- the IGIS be given the authority to suspend, on the basis of non-compliance with the law or an impropriety occurring, an interview being conducted under the warrant procedures (any such case being immediately reported to the PJCAAD).

- In view of the controversial nature of the legislation and the need to review its operation, the Committee further recommended the inclusion of the sunset clause which would terminate the legislation three years from the date of commencement. As a consequence the Government and the Parliament would be obliged to revisit the legislation if it was desired that its provisions should continue to have effect.

The text of the PJCAAD report can be found on the Committee's website at: <http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm>.

## Senate Legal and Constitutional Legislation Committee Reviews

The Senate Legal and Constitutional Legislation Committee reported on 18 June 2002. The Senate Committee made a number of additional observations on certain issues dealing with legal and constitutional matters. These issues included:

- the administrative detention of non-suspects;
- the executive power to issue warrants; and;
- the particular powers of questioning and detention in the Bill.

Noting that the Government had not yet responded to the Joint Committee's report, the Senate Committee made the recommendation that if the Government accepted all the Joint Committee's recommendations, the Bill as amended should proceed without further review.

The text of the Senate Committee's June report can be found at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/asio/report/report.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/asio/report/report.pdf).

The Government did not accept all of the Joint Committees recommendations. Subsequently, the Senate Legal and Constitutional Legislation Committee completed a further and more detailed report which was tabled in the Senate in December 2002.

In this second report the Senate Committee reinforced the JCAAD recommendations and extended them, *inter alia* recommending that:

## Issue of warrants

- the Bill be amended to provide for the appointment by the Attorney-General as a Prescribed Authority a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointment should be for a maximum period of three years;
- the definition of Issuing Authority proposed be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority;
- the Bill be amended to preclude a Prescribed Authority that has issued a warrant from supervising questioning under the same warrant;
- the maximum time allowable for questioning under a warrant be modeled on the questioning periods and down-time set out in the *(Cth) Crimes Act 1914* ;
- an extension of time for questioning under the original warrant be given by the Prescribed Authority only where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence;
- that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant could be issued for that person, for questioning for a maximum period modeled on the provisions of the *(Cth) Crimes Act 1914*;
- where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning;
- the Bill include a provision ensuring that once questioning has finished a person is free to leave;

## Detention regime:

- the Bill be amended to recognise that communications between a person and his or her legal adviser must be confidential and that legal professional privilege not be compromised;

- the Prescribed Authority be given the power to refuse to permit a particular legal adviser to attend the questioning of a person when it is believed on reasonable grounds that the legal adviser represents a security risk (but that in such circumstances the person being questioned be able to choose another legal adviser;
- that an interpreter be provided on request by the person being questioned;
- the provisions of the Bill not apply to anyone under the age of 18 years.

### Accountability measures

- the Bill make explicit the right of the Inspector-General of Intelligence and Security (IGIS) to attend during the questioning process; and
- The Senate Legal and Constitutional Legislation Committee also recommended the insertion of a sunset clause of three years from the date of commencement of the legislation.

The text of the Senate Committee's June report can be found at:

[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/asio\\_2/report/contents.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm).

### Final passage of the proposed legislation.

In December 2002, the Senate amended the Bill to reflect the recommendations of the PJCAAD and the Senate Committee. The Government accepted many of the recommendations, made by the PJCAAD and the Senate Committee with the notable exception of those relating to:

- complete access to legal representation during detention
- questioning or detention of children, and
- a proposed 3 year sunset clause.

Following the tabling of the Senate Legal and Constitutional Legislation Committee report, the Bill was the subject, along with other unrelated matters, of long debate in both Houses on the 12-13 December 2002. In the absence of agreement between the House of Representatives and the Senate on various proposed amendments at 11.42 am on the 13 December the Bill was laid aside by the House of Representatives.

Subsequently, in March 2003, an extensively amended Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2] was introduced into the House of Representatives. (Amendments included, the application of the legislation to minors between 16 and 18 only, a three-year sunset clause, and an amendment to the Intelligence Services Act empowering the PJCAAD to review the questioning and detention provisions before their expiry). After considerable debate and little amendment from the previously proposed Senate amendments, the Bill finally passed both Houses in June 2003 and commenced operation after Royal Assent on 23 July 2003.

## December 2003 amendments

Less than four months after the commencement of the *ASIO Legislation Amendment (Terrorism) Act 2003*, the newly appointed Attorney-General, the Hon Philip Ruddock MP, announced in early November 2003, that he had asked for a report on what he considered to be the 'shortcomings' of the legislation.<sup>2</sup>

On 27 November 2003, the Government introduced the *Australian Security Intelligence Organisation Legislation Amendment Bill 2003*. The purpose of this legislation was to amend the new Division 3, Part 111 of the *ASIO Act* to:

- extend the maximum period during which a person using an interpreter can be held for questioning under an ASIO warrant;
- require the subject of an ASIO warrant to surrender their passport/s and make them criminally liable if they leave Australia without permission from the Director-General of Security while a warrant is in force;
- create new offences relating to the primary or secondary disclosure of information about ASIO warrants or operational information; and
- clarify the ability of the prescribed authority to direct, in limited circumstances and where the warrant authorised questioning only, that the subject of a questioning warrant be detained.

After comparatively brief debate and passage through the House of Representatives and the Senate, the *ASIO Legislation Amendment Act 2003* received Royal Assent on 17 December 2003 and commenced on the following day.

2 Comments of the Attorney-General on the Nine Network 'Sunday' program, 2 November 2003, [http://sunday.ninemsn.com.au/sunday/political\\_transcripts/article\\_1434.asp?s=1](http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1434.asp?s=1)

